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Shared natural resources: comments and observations by Governments on the draft articles on the law of transboundary aquifers

Addendum

United States of America

1. The United States of America believes that the work of the International Law Commission on transboundary aquifers constitutes an important advance in providing guidance for the reasonable use and protection of underground aquifers, which are playing an increasingly important role as water sources for human populations. The current absence of guidance to States struggling to cope with pressures on transboundary aquifers should be addressed and the Commission's efforts to develop a set of flexible tools for using and protecting these aquifers can be a very useful contribution for such States. In its work to date, the Commission has struck a reasonable balance between the scope of coverage and extent of proposed obligations. Namely, the draft encompasses a wide scope — addressing activities, wherever located, that have or are likely to have an impact on transboundary aquifers — in order to protect aquifer systems, but is careful not to overstate the proposed obligations of parties to protect aquifers to the detriment of other important activities. In short, the Commission has made very good progress on a complex and important matter.

2. The United States continues to strongly prefer context-specific, regional and local arrangements as the best way to address pressures on transboundary groundwaters, rather than a global framework treaty. Although the draft articles may have been drafted with a framework convention in mind, the United States supports recasting such articles as recommendatory, non-binding principles — as was done in the case of liability for transboundary harm. There is still much to learn about transboundary aquifers in general, and specific aquifer conditions and State practice vary widely. Numerous factors might appropriately be taken into account in any specific negotiation, such as hydrological characteristics of the aquifer at issue; present uses and expectations regarding future uses; climate conditions and expectations; and economic, social and cultural considerations. Thus, groundwater

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arrangements are best handled by regional or local action taking into account the political, social, economic and other factors affecting each unique situation. In addition, the current draft articles go beyond current law and practice. They contain a set of obligations — including procedures for data exchange, monitoring, resource management and technical cooperation — that clearly go well beyond the current obligations of States, and so would not be suitable as a declaration of what customary law is or even a reasonable progressive development of that law. Recasting such articles as recommendatory, non-binding principles, therefore, would be consistent with the general character of much of the substance of the text, but it would require that the language should be revised to remove mandatory language and statements of obligation.

3. While the United States is not convinced that a global treaty will garner sufficient support, it is recognized that many States have expressed an interest in such a convention. If the Commission continues in this direction, despite United States reservations, there are a number of important issues that it believes would need to be addressed. Such issues include: (a) the relationship between a framework convention and other bilateral or regional arrangements, and (b) the role of non-aquifer States parties.

4. The first set of issues deals with the relationship between a convention and other agreements that affect the management and protection of transboundary aquifers. A number of other agreements have already been concluded, such as the agreements between the United States and its neighbours for the management of their boundary waters. As the Commission considers these articles further, it should ensure that parties to a framework convention have the option to conclude agreements with other aquifer States that may diverge in substance from a framework convention. Aquifer States are in the best position to judge their local situation, to weigh competing considerations and needs with respect to particular aquifers, and to manage their common aquifers as they deem best, and they should not be inhibited from doing so. Thus, the Commission should be careful not to adopt provisions that would appear to supersede existing bilateral or regional arrangements or to limit the flexibility of States in entering into such arrangements.

5. In addition, although article 19 encourages aquifer States to enter bilateral and regional agreements and arrangements to manage common aquifers, it also prohibits aquifer States from entering into an agreement or arrangement regarding a particular aquifer or aquifer system that would adversely affect, to a significant extent, the utilization, by one or more other aquifer States, of the water in that aquifer or aquifer system without their express consent. While the commentary states that this prohibition is not meant to give such other aquifer States a veto over contracting States, the effect of its plain language arguably empowers a non-participating aquifer State to thwart the conclusion of an agreement or to exact unreasonable concessions from negotiating States by withholding its express consent.

6. The United States recognizes the importance of involving all relevant aquifer States in any agreement affecting a particular transboundary aquifer. Nevertheless, the obligation to seek the express consent of the aquifer States that would be significantly adversely affected, but that are not participating in the negotiation of that agreement, may impose unnecessary and unreasonable constraints on negotiating aquifer States. States parties, whether acting alone or in concert, still would be bound to utilize the relevant transboundary aquifer in an equitable and

reasonable manner (draft article 4), and avoid causing significant harm to other aquifer States (draft article 6), among other obligations. Making the conclusion of such an agreement also dependent upon the express consent of other aquifer States, therefore, seems unnecessary, as any effort to conclude an agreement would be circumscribed by the above-mentioned provisions, and may be unreasonable to the extent it gives such other States undue influence over the separate negotiations. Rather, the United States recommends that States should be required to consult other interested aquifer States and invite such States, where appropriate, to participate in the agreement or arrangement. Such an obligation ensures that all aquifer States are made aware of the agreement and have a reasonable opportunity to participate in its development, without placing unduly burdensome restrictions on a subset of aquifer States interested in concluding a particular agreement or arrangement.

7. A second set of issues concerns States parties that do not share transboundary aquifers. The current draft articles contemplate that non-aquifer States will become parties and will have obligations with respect to activities that might affect aquifer States. Certain articles impose obligations on non-aquifer States parties, including: draft article 10 concerning States in which recharge or discharge zones are located; draft article 14 concerning activities of States that may affect transboundary aquifers; draft article 15 concerning technical cooperation with developing States; and draft article 16 concerning emergency situations that might affect a transboundary aquifer. These articles recognize that aquifers are vulnerable to pollution and other damage from sources outside the immediate circle of aquifer States. However, the articles on cooperation, information exchange, protection of ecosystems, pollution control and management do not apply to non-aquifer States. The United States recommends further consideration as to whether non-aquifer States parties should be integrated in some way in these latter provisions. For instance, draft article 11 requires aquifer States parties, where appropriate, to prevent, reduce and control pollution of their transboundary aquifer or aquifer system that may cause significant harm to aquifer States parties. However, it may be worth considering whether this obligation should be expanded to require protection against pollution that may cause significant harm to non-aquifer States parties as well, given that non-aquifer States parties would already be obligated pursuant to draft article 10 to cooperate with aquifer States parties to protect the aquifer or aquifer system.

8. Finally, if the Commission were to develop a framework convention, it would be necessary to add final clauses and ensure appropriate terminology throughout the text. In particular, the current draft articles only use the terms "aquifer State" or "State" throughout the text. However, a convention should use terms such as "aquifer Party" or "State Party" instead in order to avoid any confusion as to the breadth of the obligations set out in the convention.